

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the matter of:

Numbering Resource Optimization

CC Docket No. 99-200

Implementation of the Local
Competition Provisions of the
Telecommunications Act of 1996

CC Docket No. 96-98

Telephone Number Portability

CC Docket No. 95-116

MOTION TO ACCEPT LATE-FILED REPLY COMMENTS

The California Public Utilities Commission (California or the CPUC) and the People of the State of California hereby submit this Motion to Accept Late-Filed Reply Comments in response to the Third Order on Reconsideration in CC Docket No. 99-200, Third Further Notice of Proposed Rulemaking in CC Docket No. 99-200, and Second Further Notice of Proposed Rulemaking in CC Docket No. 95-116 (Third Order) released on March 14, 2002 by the Federal Communications Commission (Commission) in the above-captioned matters.

The staff team dedicated to numbering issues at the CPUC is currently juggling many tasks, and assigned counsel took a pre-arranged vacation in April and May, which immediately preceded the due date for the comments in this matter. For these reasons,

the CPUC prepared and submitted its Comments late on May 6, 2002. Since the opening comments were filed late, the CPUC's scheduling for Reply Comments was altered and therefore is also filed late. Since the CPUC's Reply comments were submitted shortly after the May 20th due date, and because the CPUC pledges that our Reply Comments focused solely on Opening Comments filed by other parties, we do not believe that any party will be prejudiced by our late filing. We ask the FCC to accept these late-filed Reply Comments.

Respectfully submitted,

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**REPLY COMMENTS OF THE CALIFORNIA PUBLIC UTILITIES
COMMISSION AND THE PEOPLE OF THE STATE OF CALIFORNIA**

The California Public Utilities Commission (California or the CPUC) and the People of the State of California hereby respectfully submit these reply comments in response to the Commission's Further Notice of Proposed Rulemaking ("FNPRM") in the above-referenced dockets.¹

I. DISCUSSION

As stated in our comments, the efficient use of numbering resources is imperative, as is the need to eliminate inequities within the industry and to further policies that are in the public interest. For these reasons, the CPUC urges the Commission to adopt the following policies: 1) to extend the LNP requirement to all carriers operating in the largest 100 MSAs,

¹ See *Matter of Numbering Resource Optimization, Implementation of Local Competition Provisions of the Telecommunications Act of 1996, Telephone Number Portability*, FCC 02-73, CC Dockets No. 99-200, 96-98, 95-116, Third Order on Reconsideration in CC Docket No. 99-200, Third Further Notice of Proposed Rulemaking in CC Docket 99-200, and Second Further Notice of Proposed Rulemaking in CC Docket No. 95-116 ("FNPRM").

regardless of whether the carrier receives a request to provide LNP, 2) to not exempt from the LNP requirement certain small carriers that have switches either within the largest 100 MSAs, or in areas adjoining the largest 100 MSAs, but who provide service to no or to few customers within the MSA, 3) to require all carriers in the top 100 MSAs to participate in thousand-block numbering pooling, regardless of whether they are required to be LNP capable, 4) to require all MSAs included in Combined Metropolitan Statistical Areas (CMSAs) on the Census Bureau's list of the largest 100 MSAs to be included on the Commission's list of the top 100 MSAs, and 5) to require all carriers in such MSAs to provide LNP and participate in thousand-block number pooling.

A. All LECS in the top 100 MSAs should be LNP-Capable

At a minimum, all carriers operating within the top 100 MSAs should be LNP-capable, regardless of whether they have received a request to port a number. California strongly opposes the comments of the National Exchange Carrier Association, INC. (NECA), the National Rural Telecom Association (NRTA), and the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) ("the Associations".) The Associations argue that the LNP mandate should apply only to those carriers where a specific request to port a number has been made.² They reason that LNP capability was "never intended to be used as a vehicle to conserve numbering resources; it was intended solely to facilitate competition."³ This reasoning is just silly.

² See *Comments of the National Exchange Carrier Association, Inc., the National Rural Telecom Association, and the Organization for the Promotion and Advancement of Small Telecommunications Companies*, filed May 6, 2002, p. 4.

³ *Id.* at p. 4

The Associations point out the inaccuracy of their own argument by stating “that the FCC agrees that requiring all LECS in the top 100 MSAs to be LNP-capable will further number conservation by ‘enabling carriers to alleviate number shortages by implementing code sharing and other mechanisms to transfer unused numbers among carriers that need numbering resources.’”⁴ The FCC states in the FNPRM that number conservation can be achieved via LNP, and that the benefits of such weigh in favor of a LNP requirement of all carriers within the top 100 MSAs regardless of whether they receive a bona fide request.⁵

The Associations also claim “LNP was never intended to be used for number conservation,” and therefore suggest that the “intent” for which LNP was developed should dictate its further deployment. The Associations’ comment, while perhaps technically correct, is nonsensical. It suggests that when a technology is developed for one purpose, its use should forever be limited to that one purpose. By this reasoning, the telephone network, which originally was developed and deployed for voice communication, should not presently be used to transmit data traffic as the network was not “intended” to be used for that purpose.

Similarly, the Associations’ argument would prohibit aspirin from being used to thin blood as a means of preventing heart disease because the drug was developed solely to be used as a painkiller. Undoubtedly, there are myriad contemporary technical applications that should be reversed because, by the Associations’ reasoning, those

⁴ *Id.* at p. 4

⁵ *Id.* at p. 4 citing FNPRM at ¶7.

applications were not “intended” either by their creators or by the regulators, if any, with relevant oversight. The logical extension of the Associations’ argument is an absurdity, which the FCC should soundly reject.

Despite any original “intent” for deploying LNP, it now serves a second goal, which is to conserve numbers. True, it remains vital as a means to achieve true competition between carriers, but LNP offers the added benefit of delaying number exhaust and the need to create new area codes, an equally vital concern of both the FCC and the states. Accordingly, the FCC should not reconsider its own findings on this issue, and should mandate LNP capability of all carriers operating within the top 100 MSAs, regardless of whether a request to port a number has been made.

California also opposes comments of the Cellular Telecommunications and Internet Association (“CTIA”) who propose exemption from the LNP mandate for all local exchange carriers and CMRS carriers operating within the top 100 MSAs absent a specific request from a carrier to port a number, and a cost benefit analysis. CTIA proposes that the Commission conduct a cost-benefit analysis prior to requiring LNP for any carrier that serves only a small number of customers within a Top 100 MSA.

CTIA’s proposal prompts the question of what costs and benefits should be taken into account when determining whether to require small carriers to deploy LNP. Carriers would mistakenly have the FCC believe that the only costs and benefits to consider are those of the carrier. California asserts, however that the costs and benefits to the community or customers of the failure to conserve numbers which results in the need to

implement unnecessary area code relief is what deserves FCC attention, not just expenses incurred by the industry to implement LNP.

Moreover, federal law does not require the FCC to perform a cost-benefit analysis of its LNP mandate. If the FCC were required to perform such an analysis, CTIA would be citing to the relevant statute or case law precedent establishing such a requirement.⁶ But, in fact, this is not the case. Neither the 1934 Communications Act, nor the 1996 Federal Telecommunications Act contains any provision directing the FCC to perform a cost-benefit analysis prior to adopting a regulation. Similarly, nor does the Regulatory Flexibility Act (RFA), as the United States Court of Appeals for the Fifth Circuit concluded last year:

The RFA specifically requires a “statement of the factual policy, and legal reasons for selecting the alternative adopted in the final rule.”

[Cite omitted.] Nowhere does it require, however, cost-benefit analysis or economic modeling. Indeed, the RFA expressly states that “in complying with [section 604], an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable.” 5 U.S.C. §607.⁷

⁶ Reply Comments of the CPUC, WT Docket No. 01-184, CC Docket No. 99-200, filed October 22, 2001.

⁷ *Alenco Communications, Inc., et al v. FCC*, 201 F.3d 608, 625, (5th Cir. 200), p.7.

While the FCC need not conduct a cost-benefit analysis, the Commission is, however, required to act consistently with its existing policies, or to explain, based on the record before it, why it is changing its policies.⁸ The record before the FCC does not justify a change in the FCC's pro-competitive policies that produced the LNP mandate for all telecommunications carriers. California notes that the FCC performed no cost-benefit analysis before requiring wireline carriers to deploy LNP technology, nor should it now for smaller carriers operating in the Top 100 MSAs. Wireline carriers had to meet the LNP mandate in the Top 100 MSAs more than 3 years ago, and they have incurred the costs of deploying and maintaining LNP since December 1998.⁹ Since the FCC is not required to conduct a cost-benefit analysis, it would therefore be inequitable for the FCC to now reward one segment of the industry by excusing it from having to comply with a policy previously imposed on all industry segments.

California further opposes comments offered by the Rural Cellular Association and U.S. Telecom Association who argue against the LNP mandate absent a specific bona fide request.¹⁰ California asserts that a carrier should not be categorically exempted from the LNP requirement based on the fact that it is small, or because it qualifies as a rural carrier. Instead, the FCC should delegate to the states the authority to grant carrier exemptions on a case-by-case, fact-specific basis. The appropriate situation justifying a state grant of an exemption would be where the facts show that there is not now, and will

⁸ Reply Comments of the CPUC, WT Docket No. 01-184, CC Docket No. 99-200, filed October 22, 2001, p.8.

⁹ Reply Comments of the CPUC, WT Docket No. 01-184, CC Docket No. 99-200, filed October 22, 2001, p.8.

¹⁰ Comments of Rural Cellular Association, CC Docket No. 99-200, 96-98, 95-115, filed May 6, 2002 and Comments of the United States Telecom Association, filed May 6, 2002.

not be in the foreseeable future, another carrier operating in the rate center in question. With no other carrier in the same rate center, the incumbent could not share, or pool, an NXX with that other carrier also operating in the rate center. The trigger for whether or not a carrier should be LNP capable should not be whether competition between carriers exists within the rate center. Rather, it should be based on whether or not other carriers have taken one or more NXX codes in the rate center with which the incumbent can pool and share numbers.

For example, a carrier could enter a rate center and solicit only new business but not try to recruit from the incumbent's existing customer base. While there is no pooling within the rate center because the carrier is not LNP-capable, the carrier nevertheless would be drawing on and depleting available numbers from the rate center.

Similarly, in California, the CPUC has encountered two companies providing service within a rate center and soliciting the incumbent's existing customers. However, these companies made a business decision not to port existing customer numbers, but only to offer new telephone numbers for prospective customers. In essence, these companies are soliciting the business of incumbents' existing customers while refusing to port the customers' existing numbers. In both cases, a bona fide request to port numbers has not been and may never be made, but the companies continue to draw on and exhaust available numbers within the rate centers. California therefore proposes that if there is more than one company within a rate center using available numbers, but which wishes to seek an exemption from the LNP mandate, the carrier (either incumbent or competitor) should be required to petition the state commission for a case-by-case-exemption.

B. LNP Furthers Number Utilization and Number Conservation.

California further opposes CTIA's claim that CMRS carriers with license areas or markets that partially include, or are adjacent to, a top 100 MSA market should not be required to incur the expenses associated with LNP absent a corresponding benefit to number utilization or competition.¹¹ CTIA erroneously assumes that LNP affords no benefits to number utilization or to competition. As stated in our opening comments, the benefits to competition and number resource optimization warrant a reinstatement of the original LNP requirement for all local exchange carriers and covered CMRS carriers in the largest 100 MSAs, regardless of whether they receive a request to provide LNP.

LNP would enable customers to more easily change providers and as such, promote true competition within the industry. Requiring incumbent LECs, large or small, to implement LNP is important for fostering competition since many incumbents' customers will not consider moving their business to a competitive LEC if they have to change phone numbers. A customer will also be more apt to seek service from a CLEC if doing so does not require potential multiple phone number changes if the customer later moves to another phone company (competitor or incumbent.)¹²

It is also crucial to the development of competition between carriers that customers be able to switch service and take their respective phone numbers to a competing carrier in a matter of days rather than months. Furthermore, reinstating the

¹¹ See *Comments of the Cellular Telecommunications and Internet Association*, filed May 6, 2002, p. 3.

¹²Comments of the CPUC filed May 9, 2002.

LNP requirement would further serve the public interest by enabling customers to move freely between carriers and therefore promote competition between and among carriers.

The FCC also maintains that number portability contributes to the development of competition between carriers¹³, and it would reasonably follow that the widest possible deployment of LNP would further competition. Furthermore, consumers in California have reported to us that the ability to port one's telephone number is an important issue to them; requiring them to change their telephone numbers when changing service providers frustrates both the consumer and the development of competition. As such, any further limit on the LNP mandate to carriers who have received a bona fide request would harm both the public interest and the FCC's goal of promoting true competition within the telecommunications industry.

While LNP capability contributes to the development of competition among alternative providers by allowing customers to respond to price and service changes without giving up their phone numbers, it also furthers number utilization efforts. The ability to port a customer's existing telephone number prevents a carrier from having to assign a new number and exhaust the availability of new telephone numbers. Thus, carriers that have previously obtained numerous NXX codes in various rate centers where they have activated fewer than 25 of the 10,000 numbers in each NXX code would be prevented from doing so in the future. LNP and pooling would force carriers to take blocks of numbers in smaller denominations (i.e. blocks of 1,000 vs. 10,000), and

¹³ FNRPM ¶7 stating that LNP contributes to the development of competition by, among other things, allowing customers to respond to price and service changes without changing their phone numbers.

therefore ensure the efficient use and allocation of numbers, delaying number exhaust. Furthermore, the LNP mandate would also assist in delaying the rate at which public resources are depleted, and the need for new area codes to be implemented. The FCC's decision therefore should not hinge on whether or not a bona fide request is received, but rather on the obvious benefits LNP provides to competition and number conservation efforts.

California supports comments made by WorldCom, Inc., which state that LNP should not be viewed as some optional feature of the public switched telephone network, nor should the fact that a carrier may not yet have received a LNP request for a particular switch be a barrier to LNP deployment.¹⁴ CPUC supports the proposition that by mandating the widest possible implementation of LNP, the FCC will prepare the way for

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¹⁴ Comments of WorldCom, Inc., CC Docket No. 99-200, 96-98, 95-116, filed May 6, 2002

competition from wireless and other providers.¹⁵ For similar reasons, the FCC should not exclude small companies that provide service only partially within the largest 100 MSAs.

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¹⁵ Comments of WorldCom, Inc., CC Docket No. 99-200, 96-98, 95-116, filed May 6, 2002